



**Roy Hauliers Limited v Bossuben (Appeal E081 of 2022)  
[2023] KEELRC 1449 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1449 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E081 OF 2022**

**B ONGAYA, J  
JUNE 16, 2023**

**BETWEEN**

**ROY HAULIERS LIMITED ..... APPELLANT**

**AND**

**JOHN KIMETO BOSSUBEN ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. C.K Cheptoo, Principal Magistrate delivered on 06.06.2022 in Milimani CMELR Cause No. 928 of 2019)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal dated June 27, 2022 through V Chokaa & Company Advocates. The appellant appealed against the entire judgment and decree of the trial Court. It was stated that the trial Court erred in law and fact as follows:
  - a. In holding that the respondent's employment was terminated when there was no proof of termination of the employment by the respondent.
  - b. Finding the respondent's termination was unfair and consequently awarded compensation whereas the respondent had absconded duty.
  - c. By awarding a sum of Kshs 7,000.00 as deducted from respondent's salary for fuel when there was as proof of such deduction.
2. The appellant prayed that the appeal is allowed; amounts awarded for notice pay, unfair termination and fuel deduction be set aside; and costs of the appeal for appellant.
3. Parties filed respective submissions on the appeal.
4. On June 6, 2022 the trial Court delivered judgment and entered judgment for the respondent against the appellant for:



- a. Salary for December 2018 Kshs30, 627.45.
  - b. Minimum wage balance Kshs 7, 200.00.
  - c. Notice pay Kshs 30, 627.00.
  - d. Unfair termination  $30, 627 \times 2 = \text{Kshs}61, 254.00$ .
  - e. Fuel deductions Kshs7, 000.00.
  - f. Total Kshs 136, 799,35.
  - g. Certificate of service.
  - h. Costs of the suit and interest.
5. The 1<sup>st</sup> issue is whether the respondent absconded duty so that there was no termination. The respondent pleaded that on December 20, 2018 he sought leave and was granted 3-days to go attend to his sick child in Mwatate Voi County. The Child was still admitted in hospital at expiry of the 3-days' leave. The respondent called the appellant's Director who told him that his employment was immediately terminated because he had extended his leave period. To answer to that allegation, the appellant pleaded that the respondent had on various dates been given warnings such as on January 28, 2018 on loss of fuel; on March 2, 2018 for failing to wear reflective jacket; and, fuel over consumption in May 2018. Further, the appellant pleaded that the respondent absconded duty. In his testimony the respondent stated that he took permission to take care of the sick child. The permission was granted. Further, when he came back, the watchman told him he had been ordered not to allow him in. The appellant's counsel and witness did not attend at the hearing. The respondent at the hearing as well relied on his witness statement. At paragraph 4 of the witness statement he repeated the circumstances of the termination as he had pleaded. The trial Court stated as follows,

“The respondent's claim herein is that the Claimant absconded duty. This assertion was not proved. The onus is on the Respondent while alleging that the Claimant absconded duty to show the measure it took in trying to reach out to the claimant to urge him to return to work. No such proof was tendered or alleged herein.”

The trial Court then found that the respondent had been terminated from work by the appellant. The Court finds that the finding was consistent with the material before the Court and in particular, without the appellant calling a witness to rebut the respondent's account by testimony before the trial Court, there was no reason to doubt the respondent's account on the circumstances of the termination. The first ground of appeal must collapse.

6. The second ground should then must also collapse because the trial Court found that the appellant's ground of separation namely desertion had not been established. The appellant had the burden to establish that alleged ground per section 43 of the [Employment Act](#) and having failed to do so, the trial Court correctly returned that per the respondent's account the termination had been unfair in substance and in procedure.
7. The 2<sup>nd</sup> issue is whether the award of Kshs 7,000.00 was unfair. The trial Court awarded the same based on payslips for September 2017 and May 2018 showing a deduction of Kshs 7, 000.00 each month as opposed to Kshs 25, 000.00 as had been claimed. In making the award the trial Court found that the appellant gave no evidence to justify the deduction and per the respondent's case, it was a recoverable unfair deduction. The appellant has since withdrawn that ground of appeal in its submissions.
8. The Court finds that the appeal must therefore fail with costs for the respondent.



9 In conclusion the appeal is hereby disallowed as dismissed with costs for the respondent as against the appellant.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16<sup>TH</sup> JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

